tion issues, or of which the attorney is an officer, which renders an action or suit against either seldom necessary. Moreover, if an action or suit is to be brought, an action of *indebitatus assumpsit* will generally be more convenient than a suit in equity; and to render such an action available, it seems only necessary for the plaintiff to make a demand before suing.

A stakeholder is clearly not entitled to debit himself with the stakes received by him, and therefore he is accountable for them;[1] and, though here also an action of *indebitatus assumpsit* will generally be more convenient than a bill for an account, yet a previous demand ought to be a necessary condition of maintaining such an action.

C. C. Langdell.

CAMBRIDGE.

[*To be continued.*]

LIMITATIONS IMPOSED BY THE FEDERAL CONSTITUTION ON THE RIGHT OF THE STATES TO ENACT QUARANTINE LAWS.

I.

THE subject will be treated in the following order: —

(1.) The nature of quarantine laws, and their classification in our constitutional law. This involves

(2.) The nature of the police power, and its distribution in our system of government.

(3.) The limitations imposed by the Constitution upon the police power of the States, applicable to quarantine laws. Under this head will be considered the effect of the power of Congress to regulate commerce; upon the rights of the States to enact these laws; when State quarantine regulations become unconstitutional on account of the scope of their provisions, or the purposes of their enactment; and, lastly, the effect of quarantine legislation by Congress, and the actual legislation of Congress upon this subject.

The term "quarantine" is derived through the monkish Latin

[1] Baynton *v.* Cheek, Styles, 353.

and Italian, *quarantina*, from the Latin, *quadraginta*, indicating the period of forty days of detention originally imposed upon vessels suspected of being infected with malignant disease. A quarantine law may be defined as a regulation interdicting for a certain period communication with persons or property arriving from places considered to be either infected with contagious disease, or dangerously liable to such infection. Such laws usually provide for the examination of the individuals and property detained in quarantine, the isolation of patients having the disease, and such disinfection as the examining officers deem necessary. The expenses of maintaining the quarantine are defrayed by fees collected for the purpose from the owners of the property, usually of the ships, so detained. While in its inception, and still, for the most part confined in operation to maritime transportation, quarantining by inland cities against places in the interior, as well as on the coast, has been quite common in the United States during seasons of epidemic. More serious questions are likely to arise from land than from sea quarantines, for in the former case more stringent regulations are usually necessary. It is said that the earliest systematic quarantine regulations were instituted by the Venetians, in the year 1484, to guard against the plague. Systematic quarantine was not enforced in England before 1720.[1] Perhaps the first in this country was that of New York, established in 1784, thus antedating the Federal Constitution by five years.

The establishment of quarantines came inevitably with the extension of trade, and we may expect the questions connected with them to become more important with the growth of commerce. An inquiry into the constitutional limitations of quarantine regulations is given serious, practical interest by the gross abuses of the right which have occurred during popular panics incident to epidemics. For example, on account of a single suspected case of yellow fever in New Orleans, Galveston has suspended all intercourse by water between the two cities. In some cases, even the passing through of trains from infected points has been forbidden, with the harrowing result of preventing the escape of the imprisoned inhabitants to latitudes of safety. Quarantines have been frequently resorted to as reprisals, for purposes of commercial retaliation. On this ground cities gravely infected have de-

[1] McCulloch's Commercial Dictionary, art. Quarantine.

cleared quarantines against places where the disease was not even suspected. In 1878 the city of Mobile proclaimed a quarantine against all points upon the Mobile and Ohio railroad, admitting only through freight from beyond the Ohio river, a distance of four hundred and seventy miles, through four States, there being not a case of the disease along the whole line.[1] Such examples might be multiplied. The question, what are the constitutional rights of municipalities in the matter of quarantine, apart from additional limitations imposed by State Constitutions, is the same as, what are the rights of the States themselves, for municipalities have no lawful power over the subject beyond that which is delegated to them by the State. In the examination of this question, only those constitutional limitations need be considered here which apply to quarantine laws as such. It is of course possible for a quarantine law to be unconstitutional on account of the insertion of extraordinary provisions, in no way appropriate or proper to quarantine regulation; as, for example, imposing a tonnage tax in order to defray quarantine expenses.[2] A large part of the constitutional prohibitions upon the States can be violated in the name of a quarantine law; but the unconstitutional provisions would be intrinsically foreign to the purposes of quarantine, and no more to be expected in a quarantine law than in any other.

In its effect upon the *status* of persons or property coming from the district quarantined against, a declaration of quarantine has been well compared to a declaration of war. The rights of persons are determined by the fact that they or their goods come from a certain place at a certain time. A State threatened with the introduction of an epidemic disease is in a position very similar to that of a State in imminent danger of armed invasion.[3] Declaring a quarantine is an administrative as opposed to a judicial act.[4]

[1] 4 Ala. St. Bar Ass'n, pp. 136, 137, 142.

[2] Peete *v.* Morgan, 19 Wall. 581 (1873). It is said by the court, in Morgan *v.* Louisiana, 118 U. S. 455, 463 (1886), that "in Peete's case the tax was for every vessel arriving at a quarantine station, whether any service was rendered or not," as well as measured by the tonnage of the vessel. If the fees had been imposed only as compensation for services rendered in inspection, reasonably equivalent, it would not now be held that there was a tonnage tax within the meaning of the Constitution. See Packet Co. *v.* Keokuk, 95 U. S. 80 (1877); Transportation Co. *v.* Wheeling, 99 U. S. 273, 283 (1878); Packet Co. *v.* St. Louis, 100 U. S 423, 429 (1879); Morgan *v.* Louisiana, 118 U. S. 455 (1886).

[3] Compare U. S. Const., art. i., sect. 10, cl. 3.

[4] See Metropolitan Board of Health *v.* Heister, 37 N. Y. 661, 672 (1868).

Even when declared by a municipal corporation, it seems, like the punishment of criminals by city courts, more a public act than a strictly municipal one. By the very necessity of the case, a judicial inquiry to determine the propriety of declaring the quarantine is impracticable. The inquiry usually has to be conducted under circumstances in which judicial evidence cannot be had, and hearsay is the only available information. To admit witnesses from the region suspected to be infected, or to conduct an examination of goods coming therefrom, would be to invite the very danger feared. In most cases action must be prompt, or it will be futile.

Turning now to the classification of quarantine laws in our constitutional law, we shall find these laws to belong both to the class of police regulations and the class of regulations of commerce. From the beginning there are few prominent cases in which the police power has been discussed, in which quarantine laws have not been treated as typical examples of its exercise. Just what is meant by the expression "police power" is not difficult to determine, although an exact definition is impossible at the present stage of development of constitutional law. The Supreme Court has said: "This power is, and must be from its very nature, incapable of any very exact definition or limitation."[1] The conception of police power, however, gradually becomes more definite. Certainly no one would now say with Chief Justice Taney, that the police powers of a State "are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions,"[2] although a recent opinion of the Supreme Court uses the term "police powers" to signify "the reserve powers of the State."[3] Perhaps the most satisfactory brief description is Judge Cooley's: "The police of a State, in a comprehensive sense, embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offences against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is

[1] The Slaughter-House Cases, 16 Wall. 36, 62 (1872).

[2] The License Cases, 5 How. 504, 583 (1847).

[3] W. U. Telegraph Co. *v.* Pendleton, 122 U. S. 347, 359 (1886).

reasonably consistent with a like enjoyment of rights by others."[1] Police laws may be described as laws which determine what limitations upon the conduct of each member of society shall be imposed for the protection of the rights of others. The expression "police power" has acquired a technical meaning in our constitutional law, and can hardly be said to embrace legislation upon Government institutions, public works, and like matters, — subjects which have been assigned to the police power by constitutional jurists,[2] and even by our Supreme Court.[3] Such subjects have generally been assigned in our treatises and decisions upon constitutional law to the power of taxation. It is advantageous to adopt as definite a conception as Mr. Tiedeman's: "The police power of the Government, as understood in the constitutional law of the United States, is simply the power of the Government to establish provisions for the enforcement of the common, as well as civil, law maxim, *sic utere tuo ut alienum non lædas*."[4] A few judicial descriptions of the police power follow: "The police power of the State comprehends all those general laws of internal regulation which are necessary to secure the peace, good order, health, and comfort of society."[5] "This police power of the State extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State."[6] By this power, "persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State."

If the conception of the police power just advanced be the true one, it follows that the police power which belongs to undivided sovereignty has been distributed by the Constitution, a portion being granted to the United States, and a much greater portion being left to the States.[7] Express grants of police power were the powers given to Congress to provide for the punishment of

---

[1] Cooley, Const. Lim. (5th ed.) 706.

[2] Tiedeman, Lim. of Police Power, 3, 4.

[3] Barbier *v.* Conolly, 113 U. S. 27, 31 (1884); New Orleans Gas. Co. *v.* Louisiana Gas Light Co., 115 U. S. 650, 661 (1885).

[4] Lim. of Police Power, 4; preface, vii.

[5] Chancellor Bates in P., W. & B. R.R. Co. *v.* Bowers, 4 Houst. 506, 536 (1873). To the same effect, Lake View *v.* Rose Hill Cem. Co., 70 Ill. 190, 193.

[6] Redfield, C. J., in Thorpe *v.* R. & B. R. Co., 27 Vt. 140, 149, 150, — a leading case See also Com. *v.* Alger, 7 Cush. 53 (1851).

[7] Compare Cooley, Const. Lim. (5th ed.) 724, *586.

counterfeiting the securities and current coin of the United States: to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to make rules for the government and regulation of the land and naval forces, including the militia; to exercise exclusive legislation in all cases whatsoever over the District of Columbia, the forts, dockyards, etc., of the United States.[1] Congress has also full and complete legislative power over the Territories, subject at least only to the limitations imposed upon the General Government by the Constitution. "All territory within the jurisdiction of the United States, not included in any State, must necessarily be governed by or under the authority of Congress."[2] Congress has the same ample power over the Indian tribes upon their reservations, even when the reservations are within a State.[3] To the United States Government was also granted, by necessary implication, police power to the extent "necessary and proper for carrying into execution"[4] all the powers vested in the General Government by the Constitution; for example, power to enact police regulations to protect the mails, to prevent evasion of the revenue laws, for the protection of patents, or for the regulation of commerce. All the rest of the police power incident to sovereignty, subject only to the limitations of the United States and State Constitutions, is vested in the States.[5] Therefore, an act of Congress making it a misdemeanor to sell for illuminating purposes oil made of petroleum, inflammable at a less temperature or fire-test than 110° Fahrenheit, "can only have effect where the legislative authority of Congress excludes territorially all State legislation; as, for example, in the District of Columbia. Within State limits it can have no constitutional operation."[6] Yet a similar law by a State is valid, even against a vendor who manufactured the oil in question under letters-patent granted by the United States.[7] An act of Congress, not confined in its operation to foreign and interstate commerce, punishing the

---

[1] Const., art. i., sect. 8.

[2] National Bank *v.* County of Yankton, 101 U. S. 129, 133 (1879); Murphy *v.* Ramsay, 114 U. S. 15, 44 (1884).

[3] U. S. *v.* Kagama, 118 U. S. 375 (1886).

[4] Const. art. i., sect. 8, last clause.

[5] U. S. Const., 10th amendment.

[6] U. S. *v.* Dewitt, 9 Wall. 41, 45 (1869).

[7] Patterson *v.* Kentucky, 97 U. S. 501 (1878).

counterfeiting of trade-marks, is unconstitutional on the same ground.[1]

Preliminary to the question, what limitations are imposed by the Constitution upon State quarantine laws it is necessary to inquire whether any limitations are imposed by the Constitution upon the police power of the States. The delicacy and importance of this question can hardly be over-estimated. The decisions which afford an answer are comparatively recent; and while the tide of authority is now only one way, the question cannot perhaps be said to be finally settled. The dignity of the State Governments has been considered to be involved; and at one period of our national history, the proposition that the police power of a State is limited by the Constitution was contested with bitterness.

Beginning about the year 1820, South Carolina, and, later, other slave States, enacted laws providing that if any vessel should bring into the State "any free negroes or persons of color" employed on board, such persons should be seized and confined in jail until the vessel was ready to leave. The ship captain was then bound, under penalty of fine and imprisonment, to carry them away and pay the expenses of their imprisonment. The application of these laws to foreign vessels led to diplomatic troubles, the result of which was that the laws ceased in practice to be applied to any vessels except those coming from the Northern States. In a report of the Committee on Commerce of the House of Representatives[2] in January, 1843, upon a petition of ship-owners and other citizens of Massachusetts, the constitutionality of these laws was fully discussed. The majority of the committee, in a report presented by Mr. Winthrop, took the position that the laws were unconstitutional regulations of commerce, as well as in violation of the treaties of the United States, and of the clause in the Constitution[3] which provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Colored persons, said the committee, were citizens of Massachusetts nine years before the adoption of the Constitution. It was claimed that the laws in question could not properly be called police regulations. One of the closing resolutions offered by the committee was

[1] Trade-mark Cases, 100 U. S. 82 (1879).

[2] 27th Congress, House Report No. 80 (Third Session).

[3] Const., art. iv., sect. 2.

"That the police power of the States can justify no enactments or regulations which are in direct, positive, and permanent conflict with express provisions or fundamental principles of the national compact." Appended to this report was a decision rendered in 1813 by Mr. Justice Johnson of the Supreme Court, himself a native South Carolinian, holding the law unconstitutional under the clause granting to Congress power to regulate commerce with foreign nations and among the several States, and declaring with feeling that "on the constitutionality of the law under which this man is confined, it is not too much to say that it will not bear argument."

The minority report of the committee took the ground that the laws were necessary regulations of internal police, within the reserved power of the States; that Congress had never exercised its power to regulate commerce over this subject; and that colored persons were not "citizens" in the sense of the Constitution. Quarantine laws were repeatedly cited, both in the minority report and the opinion of Attorney-General Berrien, appended in its support, as undistinguishable from the laws in question. "Is this right of self-protection," said the latter, "limited to defence against physical pestilence?" The position of the minority derived strong support from the language of the court in the case of City of New York *v.* Miln.[1] Yet the proposition laid down in the resolution above quoted was neither in the minority report nor Mr. Berrien's opinion seriously and directly controverted, — strong testimony at that period of controversy to the strength of the position.

The question is, whether by the act of the people of a State in adopting the Constitution a practice of the internal-police powers of the State Government was taken away. Now, if it be conceded that a free colored person was a citizen in the meaning of the Constitution, it can hardly be doubted at this day that a State could not, without violating the clause in the Constitution quoted above, imprison him for entering her borders. In the leading case of Gibbons *v.* Ogden,[2] the court, speaking through Chief Justice Marshall, had declared that since the law of New York was in conflict with constitutional law of the United States, it was immaterial whether or not the State law was passed "in virtue of a power to regulate domestic trade and police." Yet in the period

[1] 11 Pet. 102, 138 (1837). [2] 9 Wheat. 1, 210 (1824).

of slavery agitation which follows, opinions were not wanting "that all those powers which relate to merely municipal regulations, or what may more properly be called *internal police*, are not surrendered by the States, or restrained [by the Constitution of the United States]; and that consequently in relation to these the authority of a State is complete, unqualified, and exclusive."[1] The language quoted is from the opinion of the majority of the court in City of New York *v.* Miln,[2] where it is made the ground of the decision, and considered an "impregnable position." In that case a law of New York was held constitutional which required the masters of incoming vessels, under penalty of a fine, to report in writing to the mayor of New York the name, place of birth, and last settlement of all passengers for New York taken on board by him. Mr. Justice Story dissented, with the "entire concurrence upon the same grounds" of Chief Justice Marshall, who died after hearing the arguments, but before the final decision. The grounds of the dissenting opinion were that the power of Congress to regulate foreign and interstate commerce was exclusive, and that the States have no power to enact laws "which trench on the authority of Congress in its power to regulate commerce." It is said also, "A State cannot make a regulation of commerce to enforce its health laws, because it is a means withdrawn from its authority."[3] The view of Marshall and Story that the commercial power of Congress is a limitation upon the police power of the States is now the established doctrine. This was the express ground of decision in the leading case of Henderson *v.* Mayor of New York,[4] holding that a State cannot constitutionally impose burdens upon immigration into the United States. The court, speaking through Mr. Justice Miller, unanimously declare, "It is clear, from the nature of our complex form of government, that, whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the States." This

[1] For example, the opinions of Mr. Justice Grier in the License Cases, 5 How. 504, 631 (1847); Mr. Justice McLean in the Passenger Cases, 7 How. 283, 400 (1849); and especially City of New York *v.* Miln.

[2] 11 Pet. 102, 139 (1837).

[3] 11 Pet. 156. The same idea is expressed by McLean, J., in Groves *v.* Slaughter, 15 Pet. 449, 505 (1841).

[4] 92 U. S. 259, 272 (1875).

rule has been repeatedly and emphatically laid down by the Supreme Court.[1] In the recent Iowa liquor-law case, Bowman *v.* Chicago & N. W. Railway Co.,[2] a law of Iowa forbade any common carrier to transport knowingly intoxicating liquors to any point within the State, unless first furnished with a certificate from the auditor of the county to which said liquors were to be transported, that the consignee was authorized to sell intoxicating liquors in that county. Foreign liquors, imported under the laws of the United States, were excepted from the operation of the law while in the original packages. The defendant was sued in the United States Circuit Court for refusing to transport liquors in the absence of such a certificate. The State law was held void as conflicting with the regulation by Congress of commerce among the several States. The majority of the court, speaking through Mr. Justice Matthews, considered the law to be a regulation of interstate commerce, operating directly upon commerce itself. The subject of the transportation of goods was one capable of a national plan or system of regulation, and one which Congress, by its inaction, had in effect declared should be free from restraint. It was conceded that a State, for the purpose of protecting its people against the evils of intemperance, has the right to prohibit within its limits the manufacture of intoxicating liquors as well as all domestic commerce in them. "It may adopt any measures tending, even indirectly and remotely, to make the policy effective, until it passes the line of power delegated to Congress under the Constitution. It cannot, without the consent of Congress express or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be."[3]

Chief Justice Waite and Justices Harlan and Gray dissented. The dissenting opinion by Justice Harlan takes the position that "the police power, as far as it involves the public health, the public morals, or the public safety, remains with the States, and is

---

[1] Chy Lung *v.* Freeman, 92 U. S. 275 (1875); R. R. Co. *v.* Husen, 95 U. S. 465, 471, 472 (1877); New Orleans Gas Co. *v.* La. Light Co., 115 U. S. 650, 661 (1885); Morgan *v.* Louisiana, 118 U. S. 455, 464 (1886); Western Union Tel. Co. *v.* Pendleton, 122 U. S. 347, 359 (1886); Bowman *v.* Chicago & N. W. Ry. Co., 8 Sup. Ct. Rep. 689 (March 19, 1888), 125 U. S. 465.

[2] 8 Sup. Ct. Rep. 689; s. c. 125 U. S. 465.

[3] 8 Sup. Ct. Rep. 702, 703; 125 U. S. 493.

not overridden by the national Constitution."[1] It is even said that since "the States have not surrendered, but have reserved the power, to protect, by police regulations, the health, morals, and safety of their people, Congress may not prescribe any rule to govern commerce among the States which prevents the proper and reasonable exercise of this reserved power."[2] It is maintained that the power of Congress to regulate interstate commerce had not been exercised over this subject; that nothing short of a positive enactment of Congress ought to be construed as taking away a part of the police power of the States. While there may be room for doubt whether the inaction of Congress was rightly construed by the court, one can hardly subscribe to the language above quoted, which seems to lead to the conclusion that the powers granted to Congress by the Constitution, by its own terms, "the supreme law of the land," are controlled by the police powers of the States, where the public health, morals, or safety are involved. This seems to be an inversion of the true view, which regards each of the powers granted to the General Government as supreme in its peculiar sphere, and in so far controlling the reserved powers of the States. To find the limitations on the powers of Congress, we are to look, not to the legislation of the States, but to the Constitution.

The limitations upon the police power, that a State cannot in its exercise enter the domain of legislation which, under the Constitution, exclusively belongs to Congress, or violate the prohibitions of the Constitution upon the States, operates upon the other reserved powers of the States as well. For instance, a State cannot, in the exercise of its power of taxation, regulate foreign or interstate commerce.[3] As was said in Robbins *v.* Shelby Taxing District[4] (the "Drummer Tax Case"), "Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State." Indeed, the cases just cited seem to lay down a rule that a State cannot for any purpose pass a law which oper-

[1] 8 Sup. Ct. Rep. 712; 125 U. S. 519.

[2] 8 Sup. Ct. Rep. 712; 125 U. S. 520.

[3] Case of State Freight Tax, 15 Wall. 282 (1872); Robbins *v.* Shelby Taxing District, 120 U. S. 489, 497 (1887); Phila. Steamship Co. *v.* Pennsylvania, 122 U. S. 326 (1887). See also Brown *v.* Houston, 114 U. S. 622, 630 (1884).

[4] 120 U. S. 489, 497 (1887).

ates, to the extent of regulation, directly and immediately upon foreign or interstate *commerce itself*.[1] If this rule is to be taken as established, there are certainly two exceptions. Inspection laws, saved by the Constitution itself,[2] and quarantine laws are historical exceptions, old as the Constitution itself, and recognized throughout the whole series of decisions construing it. The question left open by the Supreme Court in Henderson *v.* Mayor of New York,[3] whether a State has power to exclude actual pauper immigrants or convicted criminals, must be considered doubtful, since the case of Bowman *v.* Chicago & N. W. R'y Co.[3] A law excluding such persons would differ from a quarantine law by not being local and temporary in its operations; so that the inaction of Congress might be construed in the one case as a regulation that no restraints shall be imposed, and not in the other.

We shall now consider the limitations imposed by the Constitution upon the police power of the States, which are applicable to quarantine laws. One limitation has already been considered, namely, that a State cannot impose a tonnage duty to defray quarantine expenses.[4] By far the most important limitation with which we have to deal is the power of Congress "to regulate commerce with foreign nations, and among the several States." Quarantine laws are, from their very nature, regulations of foreign and interstate commerce. It is practically impossible that the operation of such laws should be confined to domestic commerce, whose entire transit is within the State.[5] In the language of Chief Justice Marshall, constantly reiterated by the Supreme Court, "Commerce undoubtedly is traffic, but it is something more,—it is intercourse."[6] The case cited holds that commerce includes navigation. It has long been settled that persons as well as property are subjects of commerce in the sense of the Constitution.[7] Quarantine laws operate directly upon commerce itself, imposing re-

[1] It does not follow that all State legislation which indirectly regulates such commerce is forbidden; for example, laws to prevent confusion among vessels, and to facilitate the discharge of passengers and freight. See Gloucester Ferry Co. *v.* Penn., 114 U. S. 190, 206 (1884). Pilotage laws and port regulations seem to belong to this same class.

[2] Const., art. i., sect. 10, cl. 2.

[3] *Supra.*

[4] Const., art. i., sect. 10, cl. 3. See *supra*, p. 269.

[5] Compare Wabash Ry. Co, *v.* Ill., 118 U. S. 558 (1886).

[6] Gibbons *v.* Ogden, 9 Wheat. 1, 189 (1824).

[7] Gibbons *v.* Ogden, *supra*, p. 215; Passenger Cases, 7 How. 283 (1849).

straints amounting even to a temporary prohibition of intercourse. So far as they do not regulate commerce, they are worthless for the protection of health. It is hard to conceive rules exercising more direct control over commerce. "Transportation is essential to commerce, or, rather, it is commerce itself; and every obstacle to it or burden laid upon it by legislative authority is regulation."[1]

In discussing regulations of commerce, there is great danger of being misled by terms, for different judges have not used the words in the same sense. Upon the meaning of the phrase "to regulate commerce" in the Constitution, the decisions have indeed substantially agreed. The words are not used in a technical sense. "To regulate," said Chief Justice Marshall in Gibbons *v.* Ogden is "to prescribe the rules by which commerce is to be governed."[2] "That is," adds Mr. Justice Field, "the condition upon which it shall be conducted; to determine how far it shall be free and untrammeled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited."[3] To *exercise control* over commerce seems to be what is meant. The idea to be contrasted with regulating is affecting or influencing commerce. Commerce is so sensitive a thing that scarcely a law can be passed that does not more or less remotely affect it. Laws not otherwise unconstitutional, which operate on foreign or interstate commerce only indirectly, secondarily, and remotely, have never been treated by the courts as forbidden to the States.[4] To this class belong most, but not all, State police regulations. "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it

[1] R. R. Co. *v.* Husen, 95 U. S. 465, 470, citing other cases.

[2] 9 Wheat. 1, 196 (1824).

[3] Welton *v.* State of Missouri, 91 U. S. 275, 279 (1875).

[4] The cases establishing this distinction are numerous and uncontroverted. Many are collected in Mr. Pomeroy's article upon The Power of Congress to Regulate Interstate Commerce, 4 South Law Rev. 357, 390, *et seq.*; also in Phila. Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 346 (1886). A recent case is Smith *v.* State of Alabama, 8 Sup. Ct. Rep. 564, 124 U. S. 465 (1888). The doctrine is carefully and elaborately stated in Robbins *v.* Shelby Taxing District, 120 U. S. 489, 493 (1886).

within the meaning of the Constitution."[1] Whether a certain law regulates or only affects commerce is sometimes as difficult to determine as whether a given cause of damage was proximate or remote; yet the distinction is legally as real and necessary in the one case as the other. No sharp dividing line can be drawn where the gradations are so indefinite.

When, however, we come to consider the use of the words "regulation of commerce" as applied to State legislation, we find different meanings, due to past conflicting theories of constitutional rights. Until the question was settled whether the power of Congress to regulate foreign and interstate commerce was exclusive, or whether a like concurrent power belonged to the States, the advocates of the doctrine of absolute exclusiveness were compelled to maintain that all regulations of such commerce by the States were unconstitutional. When, therefore, they said a State law was a regulation of foreign or interstate commerce, they implied that the law was not constitutional. Now, certain State police regulations obstructing commerce — such as quarantine laws — were conceded by all to be constitutional. It had, therefore, to be assumed by those judges who maintained the theory of exclusiveness that a police regulation could not be a regulation of commerce, — a proposition which, as we have seen, was found serviceable in sustaining the laws of the slave States excluding free negroes. The result was a use of the term "regulation of commerce" which led to no little confusion. The first case in which the clause granting to Congress power to regulate commerce was construed was Gibbons *v.* Ogden.[2] There the court held that a law of New York granting for a term of years to Robert Fulton and another the exclusive right of navigating with boats moved by fire or steam all waters within the jurisdiction of the State, was unconstitutional, so far as the law applied to vessels licensed under the laws of the United States to carry on coasting-trade. Illustrations of the use of the words "regulation of commerce" in a sense excluding police regulations, will be found in the arguments of Mr. Webster[3] and Mr. Wirt,[4] as well as the opinion of Chief Justice Marshall[5] and Mr. Justice Johnson.[6] Mr. Oakley's argument, however, intimates that police regulations may be also regulations of com-

[1] Sherlock *v.* Alling, 93 U. S. 99, 103 (1876).
[2] 9 Wheat. 1 (1824).
[3] 9 Wheat. 18. [4] *Ib.* p. 178. [5] *Ib.* p. 203. [6] *Ib.* p. 235.

merce.[1] Mr. Justice Story seems to have considered police regulations and regulations of commerce as mutually exclusive terms,[2] and such was clearly the view of Mr. Justice Baldwin in Groves *v.* Slaughter.[3] On the contrary, Chief Justice Taney, for example, declared that "all of these health and quarantine laws are necessarily, in some degree, regulations of foreign commerce in the ports and harbors of the State."[4] After the question how far the power of Congress to regulate commerce is exclusive was in a degree settled by the case of Cooley *v.* Port Wardens,[5] the term "regulation of commerce" ceased to be used in a sense implying either unconstitutionality or the exclusion of police regulations. In the later decisions of the Supreme Court the words are used in the same sense in which Chief Justice Taney used them. For instance, a State quarantine law is now considered to be a regulation of commerce,[6] although a police regulation; while a large class is now recognized of regulations of foreign and interstate commerce which may be constitutionally enacted by the States. To-day, in order to be declared unconstitutional under the commercial clause of the Constitution, a State law must be not only a regulation of foreign or interstate commerce, but one in conflict with the power of regulation as actually exercised by Congress.

The view is put forward in a recent number of the HARVARD LAW REVIEW,[7] in an article by Mr. Greely, that the test whether a State law is a regulation of foreign or interstate commerce is the object of the Legislature in passing the law. If intended for police purposes, Mr. Greely contends that the law is not a regulation of commerce. Of this view it is to be said that the authorities are decidedly against it. Beyond the *dicta* of Justice Johnson in Gibbons *v.* Ogden,[8] and Woodbury in the License Cases[9] and Passenger Cases,[10] and the opinion of the court in City of New York *v.* Miln,[11] the force of which is weakened by the powerful dissent of Marshall and Story, the present writer has failed to find

[1] 9 Wheat. 72.
[2] Story on Const., § 1090, 4th ed.
[3] 15 Pet. 449, 511 (1841).
[4] License Cases, 5 How. 504, 581, 582 (1847).
[5] 12 How. 299 (1851).
[6] Morgan *v.* Louisiana, 118 U. S. 455, 463, 465 (1886).
[7] Harv. L. Rev. 159.
[8] 9 Wheat. 1, 235 (1824).
[9] 5 How. 504, 626 (1847).
[10] 7 How. 283, 552, 553 (1849).
[11] 11 Pet. 102, 137 (1837).

any authority in favor of this view. The decisions of Gibbons *v.* Ogden and Willson *v.* The Black Bird Creek Marsh Co.[1] do not fairly support such a doctrine. The other cases cited in its support are explainable as cases of either only colorable police regulations, or of regulations of commerce by the States, permissible in the absence of congressional regulations. Recent decisions expressly reject the proposed test. In Henderson *v.* Mayor of New York, the court declare that "in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." [2] This language is quoted and applied by the court in Railroad Co. *v.* Husen,[3] holding unconstitutional a statute clearly intended by the Legislature to be a health law. To the same effect is Morgan *v.* Louisiana,[4] citing other cases. The court has not hesitated to go into the mode of the actual administration of the law to determine the constitutionality of the rule enforced in a particular case.[5] Furthermore, the test suggested does not seem to be a very helpful one. How is the object of the Legislature in passing a law to be determined? To answer this question one is compelled to examine the effect and operation of the law. Mr. Greely himself is driven to resort to this method in order to save the rule he proposes from the effect of recent decisions.[6] It is no great advance to say that we are to look at the object, not the operation, of the law to decide whether it is a regulation of commerce, and then resort to the operation of the law to determine what was its object. It is simpler and more consistent with the authorities to ask directly, Does the law *operate* as a regulation of commerce?

Blewett H. Lee.

LEIPZIG.

[*To be continued.*]

---

[1] 2 Pet. 245 (1877).
[2] 92 U. S. 259, 268 (1875).
[3] 95 U. S. 465, 472 (1877).
[4] 118 U. S, 455, 462 (1886).
[5] Yick Wo *v.* Hopkins, 118 U. S. 256, 373 (1886).
[6] 1 Harv. L. Rev. 179.